UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES NEW YORK BRANCH OFFICE

AMF GRAPHICS

and Case No. 22-CA-28055

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 4-107

Robert Gonzalez, Esq., Counsel for the General Counsel.

Irving L. Hurwitz, Esq., (McElroy, Deutsch, Mulvaney & Carpenter, LLP) for the Respondent.

David Tykulsker, Esq., (David Tykulsker & Associates), for the Charging Party.

DECISION

Statement of the Case

HOWARD EDELMAN, Administrative Law Judge. This case was tried on January 16 and 17, 2008, in Newark, New Jersey. A Complaint and Notice of Hearing issued November 29, 2007 filed by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 4-107, alleging that Respondent AMF Graphics refused to execute a Collective bargaining agreement that Respondent offered on July 30, 2007 after the Union verbally accepted such offer on August 1, 2007.

On the entire record, including my observations of the demeanor of the witnesses, and a consideration of the briefs filed by General Counsel, Charging Party, and Respondent, I make the following:

Findings of Fact

At all material times Respondent, a corporation, with an office and place of business in Moonachie, New Jersey, herein called Respondent's Moonachie facility, has been engaged in the operation of a graphic display company. During the preceding 12 months, Respondent, in conducting its business operations purchased and received at its Moonachie, New Jersey facility, goods and supplies, valued in excess of \$50,000 directly from suppliers located outside the State of New Jersey. At all material times Respondent has been engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

At all material times the Union has been a labor organization within the meaning of

¹ All dates herein are in 2007, unless otherwise indicated.

Section 2(5) of the Act.

The Union has had a series of collective bargaining agreements with Respondent for about 20 years, covering a unit of:

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All full-time and regular part-time employees, except executives, sales persons, office workers, supervisory and non production workers.

The most recent collective bargaining agreement was in effect from June 20, 2004 through July 1, 2007.

The first collective bargaining negotiation took place on May 22. The negotiators were, David Goldberg, for Respondent, and Michael Fisher, for the Union. Goldberg told Fisher that he wanted to sell his building. Fisher believed that Goldberg was really going to sell the building. On June 1, Fisher sent a letter to Goldberg requesting effects bargaining. Several days later President Marian Rice and Michael Fisher, International Representatives, were informed by Goldberg that he was no longer going to sell. Thereafter, the parties agreed to several modifications and extended the expiration date.

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During a June negotiation, Fisher, Rice, and Guillermina Rojas, shop steward, were present. Present for the Respondent was Goldberg. Fisher credibly testified that any Collective bargaining agreement would have to be ratified by the unit employees.

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The next bargaining session was held on July 12. The same parties were present. They discussed health insurance, pension plan, additional holidays, and vacation plans. There was no agreement on a collective bargaining agreement. At this negotiation the parties agreed to extend to the collective bargaining agreement to July 31.

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On July 18, the parties continued to bargain about the terms set forth in the July 12, session. Additionally a Federal Mediator was called in by both parties. At some point during this negotiation, Goldberg admittedly handed Fisher a document entitled "Final Proposal" which covered terms of agreement, wages, health insurance, pension, additional days, and break times.

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On July 30, the unit employees were shown Respondent's "Final Offer". Thereafter the employees voted to strike. A short time later, Fisher met with the Mediator and Goldberg in the plant. Fisher then told Goldberg that the employees voted to strike. There is no dispute about this. Fisher also credibly testified that Goldberg stated that was the best and "Final Offer". Fisher testified that at no time in this discussion did Goldberg state, in any way, that he was taking his "Final Offer" off the table. Both Rice and Rojas corroborated Fisher's testimony.

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On August 1, Fisher received notification that the employees had rescinded their strike vote. Rojas contacted Rice who then called Fisher and told him to accept Respondent's "Final Offer". Fisher then told Rice to send a petition to the employees to ratify and accept Respondent's "Final Offer". Rice then faxed the petition to Rojas. However, Goldberg admittedly gave instructions to his managers to hold back the Union's petition from Rojas until the following week.

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I find that the three Union witnesses, described above were consistent in their direct and cross-examination. Their testimony and exhibits fall into place and are consistent with each other. Their demeanor was excellent. They responded directly to all questions put to them on direct and cross-examination without hesitation.

I find Goldberg's action of instructing his managers to hold back the Union's petition to ratify and accept Respondent's "Final Offer" is a fatal blow to his credibility. Moreover, Goldberg was often inconsistent with direct and cross-examination and his overall demeanor was poor. I find him not to be credible.

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Later on August 1, Fisher testified that he telephoned Respondent's main telephone number at 3:33 P.M. Fisher's cell phone records confirm this call. Fisher testified that he reached Goldberg by telephone and told him that the employees did not want to go on strike, and that he accepted Goldberg's "Final Offer". The phone records establish that the telephone call lasted two minutes, long enough to accept the "Final Offer". Goldberg denied that he had any telephone call from Fisher, although he admitted that he was in the plaint at that time.

Given Fisher's overall credibility, the cell phone records of this call, and negative credibility of Goldberg, I credit Fisher's testimony.

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On or about August 6, the unit employees filed a decertification petition.

On August 15, Fisher sent Goldberg a letter accepting Respondent's "Final Offer". Moreover, Respondent offered no corroborating witnesses, or written evidence in its defense.

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Analysis and Conclusions

General Counsel cites *H. J. Heinz v. NLRB*, 311 U.S. 514 (1941) and the cases cited therein.

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Once an agreement is reached by the parties, they are obligated to abide by the terms of the agreement even though those terms have not been reduced to writing. See also *Sunrise Nursing Home*, 325 NLRB 380, 389 (1998).

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There is absolutely no evidence to establish that Respondent ever took its "Final Offer" off the bargaining table. In this regard General Counsel cites *Williamhouse-Regency of Delaware*, 297 NLRB 199 (1989).

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We find that the Respondent's final offer remained open and available for acceptance on June 8, 1988. It is well settled that an offer, once made, remains on the table unless explicitly withdrawn by the offeror or unless circumstances arise that would reasonably lead the parties to believe that the offer had been withdrawn. *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87, 90 (8th Cir. 1981).

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General Counsel contends that Fisher's oral acceptance of Respondent's "Final Offer" is binding upon Respondent and cites: *Kasser Distiller Products*, 307 NLRB 899, 903, which states:

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In order to find acceptance of an offer, all that is needed is conduct manifesting intention to agree, to abide and be bound by the terms of an agreement. For example in *Kasser Distiller Products*, the following verbal exchange showed that the parties had reached an agreement: "[Union:] Do we have an agreement? [Employer:] Yes, we do." 307 NLRB at 904-905.

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Additionally, an offer can be accepted and the parties bound without the agreement, being reduced to writing and signed. *Capitol-Husting Co. v. NLRB*, 671 F.2d 237, 243 (7th Cir. 1982).

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In order to find acceptance of an offer, all that is needed is conduct manifesting intention to agree, to abide and be bound by the terms of an agreement, *Capitol-Husting Co., supra;* and that a party's word and conduct are judged by a reasonable standard with no consideration of real or unexpressed intentions. *Pittsburgh-Des Moines Steel Co.,* 202 NLRB 880, 888 (1973), citing 17 CJS, Contracts, sec. 32, p. 361.

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The facts and the above cited cases, set forth above, establish that the Union accepted Respondent's "Final Offer" on August 1.

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On August 3, the unit employees filed a decertification petition. In this connection Counsel for the General Counsel cites: *Dresser Industries Inc.*, 264 NLRB 1088, 1089 (1982).

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A rule permitting an employer to withdraw from bargaining solely because a decertification petition has been filed does not give due weight to the incumbent union's continuing presumption of majority status and is not the best way to achieve employer neutrality in the election. For these reasons, we hold that the mere filing of a decertification petition will no longer require or permit an employer to withdraw from bargaining or executing a contract with an incumbent union.

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Although Fisher testified that any collective bargaining agreement would have to be ratified by the employees, Counsel for the General Counsel cites *Childers Products Co.*, 276 NLRB 709, 711 (1985) which states:

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A union does not automatically assume the obligation of obtaining ratification of a contract negotiated on behalf of employees. If it does, however, "it is for the Union, not the employer to construe and apply its internal regulations relating to what would be sufficient to amount to ratification". *M & M Oldsmobile*, 156 NLRB 903, 905 (1966). See also *North Country Motors*, 146 NLRB 671 (1964), and *Martin J. Barry Co.*, 241 NLRB 1011 (1979).

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Remedy

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Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Respondent AMF Graphics must forthwith reduce to writing and sign the agreement reached with the Union on August 1, 2007 giving effect to its terms.

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On July 30, 2007 and thereafter, Respondent shall recognize, and upon request of the Union, bargain with the Union as the exclusive collective bargaining representative of the bargaining unit employees.

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Respondent AMF Graphics shall make whole its employees for losses, if any, which they may have suffered as a result of Respondent's failure to sign and honor the collective bargaining agreement in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd*. 444 F.2d 502 (6th Cir. 1971). This includes making whole their employees by making all unpaid fringe benefit fund contribution payments (if any) to the extent provided for by the

collective bargaining agreement and by reimbursing employees for any expenses ensuing from the set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn.2 (1980), *enfd. mem.* 661 F.2d 940 (9th Cir. 1981). Respondent shall reimburse the Union, with interest, for lost dues that would have been remitted to the Union but for Respondent's failure and refusal to honor the collective bargaining agreement reached with the Union, such sums calculated in the manner set forth in *Ogle Protection Service*, *supra*. Interest on all sums shall be computed as prescribed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent shall post an appropriate notice. This notice shall be posted in
Respondent's facility or wherever notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. When the notice is issued to Respondent, it shall sign it or otherwise notify Region 22 what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, AMF Graphics, its officers, agents, successors, and assigns, shall

20 1. Cease and desist from

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(a) Failing and refusing to reduce to writing and sign the collective bargaining agreement reached with the Union on August 1, 2007 as the exclusive collective bargaining representative of our employees in the below described unit:

All full-time and regular part-time employees, except executives, sales persons, office workers, supervisory and non production workers.

- (b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.
 - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Reduce to writing and sign the collective bargaining agreement reached with the Union on August 1, 2007, giving effect to its terms retroactive to July 30, 2007.
 - (b) Recognize and, upon the Union's request, bargain with the Union as the exclusive collective bargaining representative of the bargaining unit employees described above.
 - (c) Make all affected employees whole, with interest, in the manner set forth in the remedy section of this Decision and Order, for any loss of earnings or benefits resulting from the failure to sign and honor the collective bargaining agreement reached with the Union on August 1, 2007.

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

	transmit under the collective bargaining agreement, in a manner described in the remedy section of this Decision and Order.		
5	 (e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and coping, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order <i>Bryant Station Business Institute</i>, 327 NLRB 1135 (1994). (f) Within 14 days after service by the Region 22, post at its facility located at Moonachie, New Jersey, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for the posted by the Respondent and maintained for the respondent and maint		
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15	60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.		
20	(g) Within 21 days after service by the Region, file with the Regional Director of Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with the provisions of this Order.		
	Dated, Washington, D.C., April 28, 2008.		
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	HOWARD EDELMAN Administrative Law Judge		
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(d) Reimburse the Union, with interest, for any dues it was required to withhold and

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³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT fail and refuse to reduce to writing and sign the collective bargaining agreement reached with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 4-107 on August 1, 2007 as the exclusive collective bargaining representative of our employees in the below described unit:

All full-time and regular part-time employees, except executives, sales persons, office workers, supervisory and non production workers.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of rights guaranteed to them by Section 7 of the Act.

WE WILL reduce to writing and sign the collective bargaining agreement reached with the Union on August 1, 2007, giving effect to its terms retroactive to July 30, 2007.

WE WILL recognize and, upon the Union's request, bargain with the Union as the exclusive collective bargaining representative of the bargaining unit employees described above.

WE WILL make all affected employees whole, with interest, in the manner set forth in the remedy section of this Decision and Order, for any loss of earnings or benefits resulting from the failure to sign and honor the collective bargaining agreement reached with the Union on August 1, 2007.

(Title)

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		AMF GRAPHICS
		(Employer)
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(Representative)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

20 Washington Place, 5th Floor, Newark, New Jersey 07102-3110 Hours: 8:30 a.m. to 5 p.m. 973-645-2100.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, 973-645-3784.